UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
CASE NO. 10-md-02183-PAS

IN RE: Brican America LLC Equipment Lease Litigation

This Document Relates To All Actions

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OMNIBUS ORDER ON PROCEDURAL MOTIONS AND MOTIONS TO STRIKE PORTIONS OF *BLAUZVERN* COMPLAINT

THIS MATTER is before the Court on the Motions To Transfer [Case No 10-cv-20782, DE-12; Case No. 10-cv-21608, DE-10], Motions To Stay [Case No 10-cv-20782, DE-50; Case No. 10-cv-21608, DE-38], the Motion To Enjoin [Case No. 10-cv-21608, DE-41] related state court proceedings in Iowa and the Motions To Strike [Case No. 10-cv-20782, DE-13, DE-16]. As discussed at the December 2, 2010 Status Conference, and for the reasons provided below, the Motions To Transfer, Stay this action and Enjoin the Iowa state court actions will all be denied. The Motion To Strike the jury demand from the *Blauzvern* Complaint will be granted, but the Motion To Strike references to the *Optical Technologies* action from that Complaint will be denied.

1. Motions To Transfer

a. Background Facts

The Court assumes the Parties have knowledge of the underlying allegations such that it only needs to address the allegations and background facts bearing directly on the legal issues that the Court must resolve. In these actions, Plaintiffs claim they were victimized by a scheme in which they agreed to purchase from Brican LLC or Brican America, Inc. ("Brican Inc.") (collectively "Brican"), through an installment sales or loan agreement labeled as a financing lease ("Equipment Agreements"), a flat screen television, a computer, and software (collectively "Display System")

used to display advertising in the office of each Plaintiff. Though the total fair market value of each Display System was $3,500, Plaintiffs agreed to pay approximately $30,000 over the life of the Equipment Agreements to use the System. Plaintiffs claim they were induced into entering the Equipment Agreements by Brican's representations that Plaintiffs could purchase the systems for effectively no cost. Brican proposed that one of its related companies would pay Plaintiffs, under a simultaneously-executed marketing or advertising agreement ("Marketing Agreement"), a sum of money almost equal to the monthly lease payments Plaintiffs had to pay under Equipment Agreements for advertising the services offered by the related entity on the Display Systems.

Because Brican and its related companies did not have adequate funding to make payments to Plaintiffs under the Marketing Agreements, Brican entered into a financing arrangement with NCMIC (doing business under the name Professional Solutions Financial Services ("PSFS")) whereby NCMIC would become the lessor under the Equipment Agreements in return for making a lump sum payment of $24,000 to Brican for each Equipment Agreement. As a result, NCMIC ultimately wound up being the lessor for the vast majority of the Equipment Agreements.[1] However, some Plaintiffs signed Equipment Agreements in which Brican Inc. was identified as the lessor ("Brican Agreements")[2] and NCMIC became the lessor under the Brican Agreement through an assignment, while others signed Agreements directly with PSFS where PSFS was identified as

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[1] At some point, Brican Inc. began to assign some of the Brican Agreement to Brican Financial Services, which is a Florida corporation. Defendants do not appear to contest that venue for cases involving Agreements assigned to Brican Financial Services and the Court need not address proper venue for the small number of Plaintiffs who executed an Equipment Agreement that was transferred to Brican Financial Services. Six of the *Wigdor* plaintiffs entered a Brican Agreement that was assigned to Brican Financial Services.

[2] There are 48 individual and business entity *Wigdor* Plaintiffs who entered into a Brican Agreement that was assigned to NCMIC.

the lessor ("PSFS Agreements")[3].

The Brican Agreements were formatted in a "single-column" style and contained the following provision:

> **13. GOVERNING LAW, CONSENT TO JURISDICTION AND VENUE OF LITIGATION AND WAIVER OF JURY RIGHTS:** You agree this lease is to be performed in Dade County, Florida and this Lease will be governed by the laws of the State of Florida. You consent to personal jurisdiction and venue in the State or Federal Court located in Miami, Dade County, Florida.... *If this Lease is assigned by Lessor, You consent to personal jurisdiction and venue in the State or Federal Court located where the Assignee's Corporate Headquarters is located.* This is known as a floating forum selection clause and You agree that this is done knowingly and voluntarily and is an essential term to Assignee's willingness to take an assignment of this Lease....

(Case No. 10-cv-21608, DE-1-3 at page 98) (emphasis added). Pursuant to Brican and NCMIC's financing arrangement, Brican Inc. assigned the Brican Agreements over to PSFS as a standard practice after the Plaintiffs executed those Agreements, thereby triggering the floating forum-selection provision through which Plaintiffs consented to jurisdiction and venue in the state where NCMIC/PSFS's corporate headquarters is located, Iowa.

PSFS Agreements, on the other hand, were formatted in a "three-column" style and contained a choice-of-law and forum-selection provision different than the provision in the Brican Agreements:

> **13. GOVERNING LAW, CONSENT TO JURISDICTION AND VENUE OF LITIGATION.** This lease and each Schedule shall be governed by the internal laws for the state in which Lessor's or Lessor's assignee's principal corporate officers are located. **IF THIS IS ASSIGNED, YOU AGREE THAT ANY DISPUTE ARISING UNDER OR RELATED TO THIS LEASE WILL BE ADJUDICATED IN THE FEDERAL OR STATE COURT WHERE THE ASSIGNEE'S CORPORATE HEADQUARTERS IS LOCATED AND WILL BE GOVERNED BY THE LAW OF THAT STATE. YOU HEREBY CONSENT TO PERSONAL JURISDICTION AND VENUE IN THAT COURT AND WAIVE ANY RIGHT TO TRANSFER VENUE.**

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[3] There are 90 individual and business entity *Wigdor* Plaintiffs who entered into a PSFS Agreement.

(*Wigdor*, DE-1-3 at page 54) (emphasis in original). Because NCMIC was supposed to administer the Equipment Agreements under their financing arrangement with Brican Inc., NCMIC had no reason to assign the PSFS Agreements. Thus, until the Plaintiffs began filing lawsuits, the floating forum-selection provision in the PSFS Agreements was never triggered.[4] However, on March 30, 2010, NCMIC created a company called PSFS 3, and began assigning the PSFS Agreements (and some of the Brican Agreements) over to PSFS 3 the next day. (*See* Case No. 10-cv-21608, DE-41 at pages 2 and 3). NCMIC does not dispute that it created PSFS 3 solely for the purpose of assigning Leases to trigger the forum-selection provision in the Leases. NCMIC moves to transfer these actions, claiming that the forum-selection clauses require adjudication of the litigation in Iowa in light of the transfers of all of the Equipment Agreements to an Iowa corporation (either NCMIC or PSFS 3).

b. Analysis

The Court will deny the motion to transfer. First, NCMIC incorrectly argues that the floating forum-selection clause in the Brican Agreements requires transfer of the actions in which Plaintiffs executed a Brican Agreement. The Brican Agreements only provide that Plaintiffs "consent to personal jurisdiction and venue" in Iowa, not that they ***must*** bring an action in Iowa. In other words, the forum-selection clauses in the Brican Agreements are "permissive," not "mandatory," *see Land-Cellular Corp. v. Zokaites*, 2006 WL 3039964, at *6 (S.D. Fla. Sep. 26, 2006) (clause stating that debtor "irrevocably submits and consents to the jurisdiction" of a Pennsylvania state court is permissive, not mandatory), and do not require Plaintiffs to file their suit in Iowa. *See Florida Polk Cty. v. Prison Health Servs., Inc.*, 170 F.3d 1081, 1084 n.8 (11th Cir.

[4] The *Wigdor* class action was filed in Florida state court on March 3, 2010. The *Blauvzern* class action was filed on March 16, 2010.

1999) (federal courts are only to enforce "those clauses that unambiguously designate the forum in which the parties must enforce their rights under the contract"). As a result, Plaintiffs who executed Brican Agreements had a right to assert their claims in this venue, and Court will not transfer actions brought by Plaintiffs who executed those Agreements.

Second, even though the floating forum-selection clause in the PSFS Agreements are mandatory, *see, e.g., Wolfe v. Carefirst of Mayland, Inc.*, 2010 WL 1998290, at *4 (E.D. Tex. Apr. 27, 2010) (provision saying that all actions arising out of policy "will be brought and maintained" in Maryland is mandatory); *JP Morgan Chase Bank, N.A. v. Coverall No. Am., Inc.*, 2009 WL 1531779, at *3 (N.D. Ohio June 1, 2009) (provisions stating that disputes arising out of contract "will be brought" in New Jersey is mandatory), the Court is not compelled to adhere to those forum-selection clauses and will not do so given the circumstances surrounding the assignments of the PSFS Agreements. In determining whether the forum-selection clause in the PSFS Agreements should be given effect and/or the actions should be transferred, the Court is governed by 28 U.S.C. 1404(a). *See Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988).

Even if a forum-selection clause is enforceable and mandatory, a Court is not required to transfer the actions if it can refuse to do so in accordance with § 1404(a). *See Stewart*, 487 U.S. at 30 ("It is conceivable in a particular case, for example, that ... a district court acting under § 1404(a) would refuse to transfer a case notwithstanding the counterweight of a forum-selection clause, whereas the coordinate state rule might dictate the opposite result."). However, the presence of a forum-selection clause "will be a significant factor that figures centrally into the district court's calculus" in deciding whether to transfer. *Id.* at 29. Additionally, in the Eleventh Circuit, the "venue mandated by a choice of forum clause rarely will be outweighed by other 1404(a) factors."

In re Ricoh, 870 F.2d 570, 573 (11th Cir. 1989). When a motion under §1404(a) "seeks to enforce a valid, reasonable choice of forum clause, the opponent bears the burden of persuading the court that the contractual forum is sufficiently inconvenient to justify retention of the dispute." *Id.*

Here, Plaintiffs who executed the PSFS Agreements have satisfied their burden of establishing this is a "rare" case where the Court should decline to enforce a mandatory forum-selection clause because they have shown that a transfer would clearly contravene "the interest of justice." The *Blauzvern* and *Wigdor* Plaintiffs filed their action before the Agreements were assigned, and it would be inequitable to allow Defendants to shop the actions to another forum simply by assigning the Leases after the lawsuit is filed. NCMIC has also presented no facts giving rise to a belief that Iowa is a more convenient forum than Florida, especially given that the Brican corporate and individual Defendants all reside in Florida and all Brican documents are located here. Finally, NCMIC informed the MDL Panel of the existence of the floating forum-selection clauses, and the MDL Panel still sent the cases to Florida.[5] Because the MDL Panel has already expended resources in deciding where these actions should be litigated and the clauses in the PSFS Agreements are being triggered belatedly for the purposes of forum shopping, the Motion To Transfer will also be denied as to the cases involving PSFS Agreements.

2. Motion To Enjoin Iowa State Court Actions

Plaintiffs move to enjoin a veritable avalanche of breach of contract actions (over nine-hundred) that NCMIC and PSFS 3 brought in Iowa state court against the Plaintiffs for breach of the Equipment Agreements after the *Blauzvern* and *Wigdor* actions were filed. The defendants in the

[5] Although the *Patel* action was not filed until April 12, 2010, that action involves less than 30 plaintiffs and the MDL Panel has already decided to transfer it to this Court. Accordingly, the Court sees no reason to treat that action differently than the *Blauzvern* and *Wigdor* actions.

state court actions (who are Plaintiffs in this action) moved shortly thereafter to dismiss the state court actions for lack of personal jurisdiction or, in the alternative, to stay the actions in light of the litigation before this Court. The motions were consolidated in front of one judge, the Honorable Michael D. Huppert. Judge Huppert denied the motions to dismiss for lack of jurisdiction, concluding that the forum-selection provisions in which defendants acceded to jurisdiction in Iowa in the assigned Brican and PSFS Agreements were not unreasonable, unjust or brought about through fraud.

However, Judge Huppert granted in-part the defendants' motion for a stay. First, he concluded that a stay was appropriate for all of the cases arising from Brican Agreements (which have a Florida choice-of-law provision) because this MDL action "is the only forum to afford all parties 'complete relief.'" (Case No. 10-cv-21608, DE-41-2 at page 18). Nevertheless, he denied the request to stay actions involving disputes over PSFS Agreements because those actions involve efforts by Iowa corporations to enforce contracts in which it was agreed (post-assignment) that Iowa would be the forum jurisdiction and Iowa law would apply.

Plaintiffs claim this Court can enjoin further prosecution of the Iowa state court actions under the All Writs Act, 28 U.S.C. § 1651, which provides that federal courts may "issue all writs necessary or appropriate in aid of their respective jurisdictions." While the Anti-Injunction Act, 28 U.S.C. § 2283, prohibits federal courts from enjoining state court proceedings, it provides a commensurate exception for injunctions issued "where necessary in aid of [a federal court's] jurisdiction, or to protect or effectuate its judgments." *See also*, *Burr & Forman v. Blair*, 470 F.3d 1019, 1026 (11th Cir. 2006) (the All Writs Act and the Anti-Injunction Act "work in conjunction to enable a federal court to exercise its jurisdiction and enforce its judgments and, at the same time,

limit the court's ability to interfere with state court proceedings"). To issue an injunction halting a state court proceeding, the injunction must fall within one of the Anti-Injunction Act's exceptions, *id.* at 1028, which in this case can only be the exception for injunctions that are "necessary in aid of [the Court's] jurisdiction."

The Eleventh Circuit Court of Appeals has stated that a federal court ordinarily "may issue an injunction 'in aid of its jurisdiction' in only two circumstances (which do not apply here): (1) where the district court has exclusive jurisdiction over the action because it has been removed from state court; or, (2) where the state court entertains an *in rem* action involving a res over which the district court has been exercising jurisdiction in an *in rem* action. *In re Ford Motor Co.*, 471 F.3d 1233, 1251 (11th Cir. 2006). However, the Court of Appeals has also acknowledged a third "complex multi-state litigation" exception enabling a district court to enjoin a state court proceeding in aid of its jurisdiction when it has retained jurisdiction over complex, in personam lawsuits. *In re Ford Motor Co.*, 471 F.3d 1233, 1251 (11th Cir. 2006). "The threat to the federal court's jurisdiction posed by parallel state court actions is particularly significant where there are conditional class certifications and impending settlements in federal actions." *In re Diet Drugs*, 282 F.3d 220, 236 (3rd Cir. 2002).

Nevertheless, an injunction is not "necessary in aid of a federal court's jurisdiction when the same claim is being pursued simultaneously in a state court proceeding." *Blair*, 470 F.3d at 1029. In other words, "[t]he simple fact that litigation involving the same issues is occurring concurrently in another forum does not sufficiently threaten the court's jurisdiction as to warrant an injunction under [the All Writs] Act." *Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1103-04 (11th Cir. 2004). In the complex multi-state litigation context, federal courts will enjoin the prosecution of

parallel state proceedings only when they find that substantial resources have been invested in the complex federal litigation such that a parallel state court action would "disrupt the orderly resolution of the federal litigation."[6] *In re Diet Drugs*, 282 F.3d at 236; *see also Wesch v. Folson*, 6 F.3d 1465, 1470 (11th Cir. 1993) (federal court had already entered final judgment adopting redistricting plan before similar state court action was filed); *Battle v. Liberty Nat'l Life Ins. Co.*, 877 F.2d 877, 882 (11th Cir. 1989) (enjoining three state court plaintiffs from pursuing claims substantially similar to claims settled by final judgment in federal antitrust class action lawsuit).

Here, the Court has not yet issued any orders or judgments that it needs to protect from interference. Accordingly, not only is Plaintiffs' motion moot as to Iowa state court actions involving Brican Agreements (which have all been stayed), but is premature as to the actions involving PSFS Agreements. Right now, those actions are simply parallel actions to this nascent federal action, and circumstances warranting an injunction do not yet exist. The Motion To Enjoin will be denied without prejudice.

3. Motion To Stay In Light of Bankruptcy Proceedings

NCMIC and PSFS 3 have filed a motion to stay the entire action in light of the bankruptcy proceedings initiated against Brican LLC. They argue that while a non-debtor co-defendant is generally not entitled under 11 U.S.C. § 362(a) to a stay of proceedings, a stay can occur under "unusual circumstances" such as when "a judgment against the third-party defendant will in effect be a judgment or finding against the debtor." Cases outside of the Eleventh Circuit do say that a stay may be extended to a debtor where "action taken against the non-bankrupt party would

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[6] "In several cases, courts have analogized complex litigation cases to actions in rem. As one court reasons, 'the district court has before it a class action proceeding so far advanced that it was the virtual equivalent of a res over which the district judge required full control." *In re Diet Drugs*, 282 F.3d at 235 n.12 (quotation omitted).

inevitably have an adverse impact on property of the bankrupt estate." *In re 48th Street Steakhouse, Inc.*, 835 F.2d 427, 431 (2d Cir. 1987).

However, NCMIC and PSFS 3 admit in their Motion To Stay that they have "made it abundantly clear that there is ***no*** identity of interests between Brican and NCMIC." (Case No. 10-cv-21608, DE-38 at page 9) (emphasis in original). Though the "unusual circumstances" exception is meant to apply "where a non-bankrupt codefendant is entitled to absolute indemnification by the debtor," *Duval v. Gleason*, 1990 U.S. Dist. LEXIS 18398, at *10 (N.D. Cal. Oct. 19, 1990), NCMIC has not demonstrated that it would be entitled to any kind of indemnification by Brican LLC or that Brican LLC possesses any property that would be impacted by a judgment against NCMIC. Moreover, the chief case upon which NCMIC relies states that a stay is not warranted "where the debtor and [the non-debtor] are joint tortfeasors or where the non-debtor's liability rests upon his own breach of duty." *A.H. Robins Co. v. Piccinin*, 788 F.2d 994, 999 (4th Cir. 1986). In this case, because Plaintiffs allege that NCMIC and the Brican group of Defendants are joint tortfeasors, the "unusual circumstances" exception is inapplicable. As a result, NCMIC's motion to stay will also be denied.

4. *Blauzvern* Motions To Strike

Finally, because resolving the two Motions To Strike filed in *Blauzvern* will help Plaintiffs refine their pleadings, the Court also will address those Motions. The Motion To Strike the jury trial demand in the *Blauzvern* Complaint will be granted in light of the jury waiver provisions in the contracts at issue in this case, and Plaintiffs shall not include a jury demand in any future iterations of their complaints. However, as discussed at the Status Conference, Plaintiffs can reference the *Optical Technologies* litigation in their complaint as the equipment financing fraud at issue in that

action is sufficiently similar to the allegations in this action, and sufficiently connected to Defendant Jean Francois Vincens, that references to *Optical Technologies* are not "immaterial" or "impertinent" under Fed. R. Civ. P. 12(f). The Motion To Strike references to *Optical Technologies* will be denied. Accordingly, it is hereby

ORDERED THAT

(1) The Motions To Transfer [Case No 10-cv-20782, DE-12; Case No. 10-cv-21608, DE-10] are DENIED.

(2) The Motions To Stay [[Case No 10-cv-20782, DE-50; Case No. 10-cv-21608, DE-38] are DENIED.

(3) The Motion To Enjoin [Case No. 10-cv-21608, DE-41] is DENIED.

(4) The Motions To Strike references to *Optical Technologies* [Case No. 10-cv-20782, DE-13 is DENIED.

(5) The Motions To Strike the jury demand [Case No. 10-cv-20782, DE-16] is GRANTED.

DONE and ORDERED in Miami, Florida, this 6th day of December, 2010.

PATRICIA A. SEITZ
UNITED STATES DISTRICT JUDGE

cc:
Magistrate Judge John J. O'Sullivan
All Counsel of Record